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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/505,440	08/24/2004	Eberhard Ammermann	3165-107	2309
6449 7590 05/18/2010 ROTHWELL, FIGG, ERNST & MANBECK, P.C. 1425 K STREET, N.W. SUITE 800 WASHINGTON, DC 20005				
EXAMINER				
PURDY, KYLE A				
ART UNIT		PAPER NUMBER		
1611				
NOTIFICATION DATE		DELIVERY MODE		
05/18/2010		ELECTRONIC		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

PTO-PAT-Email@rfem.com

**Advisory Action
Before the Filing of an Appeal Brief**

Application No.

10/505,440

Applicant(s)

AMMERMAN ET AL.

Examiner

Kyle Purdy

Art Unit

1611

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 03 May 2010 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.
Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: _____.
Claim(s) objected to: _____.
Claim(s) rejected: 1, 2, 11 and 15.
Claim(s) withdrawn from consideration: 3, 4, 8, 9 and 12-14.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). _____.
13. ☐ Other: _____.

/Sharmila Gollamudi Landau/
Supervisory Patent Examiner, Art Unit 1611

/Kyle Purdy/
Examiner, Art Unit 1611

Continuation of 11, does NOT place the application in condition for allowance because: Applicants arguments filed 5/3/2010 regarding the rejection of claims 1, 2 and 11 made by the Examiner under 35 USC 103(a) over Wachendorff-Newmann (US 6787567); and of claim 15 over Dutzmann et al. (WO 98/47367) evidenced by its English equivalent US 6306850 in view of Duvert et al. (WO 00/47047) and have been fully considered but they are not found persuasive.

In regards to the 103(a) rejections, Applicant asserts the following:

A) The combination of fungicides is nonobvious; and

B) Dutzmann does not demonstrate synergy, it shows that synergy is not present.

In response to A, this is not found persuasive. Although there are a myriad of compounds listed in Wachendorff, each of those compounds are taught to be useful for the same purpose, i.e. killing pests. It's acknowledged that aside from a common purpose, there is nothing in Wachendorff that would suggest their combination. However, the fact both are used for a common purpose, any ordinary person would have envisaged a composition comprising the two. It is prima facie obvious to combine compounds known to have a specific benefit, in order to arrive at a third composition to be useful for the same purpose. The picking and choosing of pesticides isn't taking a stab in the dark like picking a side group on a Markush structure and hoping for some result. Wachendorff clearly lists the instant compounds as useful fungicides and provides an equation for determining/evaluating synergy. Any ordinary person would have been able to pick and chose from those known pesticides to arrive at the instant composition.

In response to B, the Examiner disagrees. Prothioconazole (compound I) when applied at 2.5 g/ha has a pesticidal efficacy of 21% whereas when applied at 0.5 g/ha has a pesticidal efficacy of 0. Trifloxystrobin (compound XII) when applied in an amount of 2.5 g/ha has an efficacy of 59%. When compound I and XII are used together in an amount of 0.5 and 2.5 it is expected to have an activity of 59%. However, it was found to actually have an activity of 75%. Thus, in contrast to Applicants assertion, synergy appears to be occurring. Applicants arguments are not found persuasive.